INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	3
Statement	4
Argument	7
Conclusion	13

CITATIONS

Cases:	
Belt, In re, 159 U. S. 95	7
Bigelow, Ex parte, 113 U. S. 328	7
Burns v. *United States*, 287 U. S. 216	8
Eckart, In re, 166 U. S. 481	7
Grant and Burlingame v. *United States*, 227 U. S. 74	7, 11
Michigan-Ohio Bldg. Corp., In re, 117 F. (2d) 191	11
Nix v. *James*, 7 F. (2d) 590	9
Peterson, Ex parte, 253 U. S. 300	11
Phelps v. *Mutual Reserve Fund Life Assn.*, 112 Fed. 453, affirmed 190 U. S. 147	12
Reeves v. *United States*, 35 F. (2d) 323	9
Riddle v. *Dyche*, 262 U. S. 333	7
Riggs v. *Johnson County*, 6 Wall. 166	12
Rosenwinkel v. *Hall*, 61 F. (2d) 724	9
Scalia v. *United States*, 62 F. (2d) 220	9
Statutes:	
Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by Act of June 16, 1933, c. 97, 48 Stat. 256, 18 U. S. C. 724	3
Act of June 25, 1938, c. 676, 53 Stat. 1060, 29 U. S. C. 201	3, 8
Judicial Code, sec. 262, (28 U. S. C. 277)	12

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 826

NATHAN BERGER, SAMUEL KAMINSKY, AND SIDNEY E. COHN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 116–121) and of the District Court (R. 100–104) have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 21, 1944 (R. 122). The petition for a writ of certiorari was filed on January 10, 1945. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

QUESTIONS PRESENTED

The petitioners Berger and Kaminsky pleaded guilty to violations of the Fair Labor Standards Act, and were placed upon probation by the district court. The probation order provided, *inter alia*, that they should pay a specified amount as restitution of wages unlawfully withheld from their employees, and that such amount should be allocated among the employees in a manner to be determined by the Wage and Hour Division. In compliance with this provision, to which they had consented, the petitioners tendered the specified amount in the court, which then directed that the money be deposited in a joint bank account in the names of the petitioner Cohn, counsel for the other petitioners, and the regional attorney for the Wage and Hour Division, and that it be disbursed according to the allocations to be made by the Division. Subsequently, when such allocations were made, Cohn refused to sign any checks for distributing the fund. The district court thereupon ordered Cohn to sign the necessary checks.

Although the petition for certiorari presents fifteen questions, we believe that, in essence, only three issues are involved:

1. Whether the validity of the probation order is open to attack by the petitioners in the present proceeding.

2. If the first question should be answered in the affirmative, whether the probation order was valid.

3. Whether the order directing Cohn to sign the checks was proper as an incident to the enforcement of the probation decree.

STATUTE INVOLVED

Although the case arose originally under the Fair Labor Standards Act of 1938,[1] Section 1 of the Probation Act[2] is the only statutory provision involved here. It provides:

> the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided,* That the period of

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*

[2] Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by Act of June 16, 1933, c. 97, 48 Stat. 256, 18 U. S. C. 724, 725.

probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

STATEMENT

On October 20, 1941, petitioners Berger and Kaminsky pleaded guilty to an information charging them with violations of the Fair Labor Standards Act (R. 2). Imposition of sentence was suspended, and they were placed on probation (R. 2–3). One of the conditions of the probation order was that they make restitution to their employees of wages unlawfully withheld, in the sum of $27,094.08 (R. 22–23). The petitioners had agreed, prior to entry of the order, that that amount was due and owing to their employees (R. 27, 76, 101, 120). They had also consented to the provision of the probation order directing the Wage and Hour Division to allocate the money among the individual employees (R. 27, 76, 101, 120).

In June 1942, Berger and Kaminsky "appeared in Court, and through their Counsel Sidney E.

Cohn, offered to pay * * * the full amount of $27,094.08 into Court * * *" (R. 102). The district court directed the petitioners and the Labor Department's representative to agree upon "the place and manner of deposit" of the tendered sum (R. 102, 118). The attorneys agreed to deposit the money in a specified bank to their joint order (R. 102, 118). This was approved by the district court, and the deposit was made (R. 102, 118). Having thus complied with the condition of the probation order, Berger and Kaminsky were discharged from probation (R. 28, 103, 118).

After the Wage and Hour Division had allocated the money among the employees as directed by the court order, petitioner Cohn refused to sign checks distributing the fund (R. 103, 118). The United States Attorney then applied for an order directing Cohn to sign the checks (R. 26–29). In an affidavit (R. 54–59) filed in opposition to this application, Cohn alleged that the district court had modified the original probation order by making it the joint responsibility of Cohn and the Division to determine the amounts, "if any," due to employees (R. 55). The district court ordered petitioner Cohn to sign the checks (R. 98–99). In his opinion, the district judge stated that Cohn was seeking the adoption of a method of allocation different from that provided by the probation order; that the deposit was made at the court's direction and with its approval, in pursuance of

the terms of the probation order; that the court had never modified those terms; and that when the probation order was made, Berger and Kaminsky and their attorney clearly understood that "control of allocation by the Wage and Hour Division was necessary to protect the employees", and that they had voluntarily accepted such control (R. 102–103).

The Circuit Court of Appeals, in affirming the district court's order, noted that "The record shows that the deposit was made * * * with the approval of the [district] court and was treated by the court as the fulfillment by Berger and Kaminsky of the conditions of their probation. It was by no means merely the private arrangement which the appellants now call it". (R. 121.) The court below also held that "it is now too late for appellants, Berger and Kaminsky, to object to the amount or the manner of the distribution" (R. 120–121); that "Cohn [has no] interest to protect in respect to the content and conditions of the probation order" (R. 121), and that the order under review was simply "in aid of the enforcement of the order of probation" (R. 121), and conferred no rights upon Cohn nor any duty other than that of distributing the money as the court ordered; and that in any event both the probation order and the order appealed from were without error (R. 119–120, 121).

ARGUMENT

The decision below is correct, and neither a conflict of authorities nor any question of importance is presented.

1. The petitioners' complaint is directed primarily against the validity of the original probation order, rather than the order immediately involved here. We submit, however, that if the probation order is open to collateral attack in the present proceeding, the scope of review is limited to the jurisdiction of the district court to issue the order. *In re Eckart*, 166 U. S. 481, 485; *Riddle* v. *Dyche*, 262 U. S. 333; *In re Belt*, 159 U. S. 95; *Ex parte Bigelow*, 113 U. S. 328. The petitioners do not raise any jurisdictional questions. No claim is here made that the district court lacked jurisdiction over the petitioners and the offense with which they were charged. Whether the court was authorized to place Berger and Kaminsky on probation, and to order restitution as a condition of probation, relate only to the proper exercise of the court's jurisdiction.[3] *In re Eckart* and other cases cited, *supra*.

[3] Berger and Kaminsky voluntarily accepted the terms of the probation order (R. 101, 120). Having done so, they can hardly now contest the validity of the decree. Since Cohn, their attorney, has no pecuniary or other substantial interest in the probation order, he likewise lacks standing to attack its validity in the present proceeding. *Grant and Burlingame* v. *United States*, 227 U. S. 74.

2. In any event, the probation order was clearly valid. The petitioners contend that the district court's power to place defendants on probation is limited to convictions for which a sentence of imprisonment can be imposed. Section 16 (a) of the Fair Labor Standards Act limits punishment of first offenders to fines up to $10,000 for each offense. Berger and Kaminsky, who faced the possibility of fines totaling $260,000, now contend that because they were first offenders, the district court had no authority to admit them to probation.

The court below properly rejected this argument, stating that "the Probation Act * * * contains no such limitation upon its scope" (R. 119). No basis can be found in the Act for the inference that it is limited to crimes punishable by imprisonment. The purpose of the Probation Act is "to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable" (*Burns* v. *United States*, 287 U. S. 216, 220). This purpose may well be served by relieving a penitent offender of the hardship and expense of a fine. The interpretation adopted by both courts below permits this to be done. It enables penitent offenders to be benefited without injury to the public. On the other hand, no useful purpose is to be achieved by

reading into the Act the limitations urged by the petitioners. The petitioners' construction would limit the power of the courts to do justice according to the necessities of particular cases, and would compel them to impose fines that might otherwise be suspended to the benefit of the defendants and the public. Since the Probation Act is remedial, the Court should resolve any ambiguity in favor of the more liberal interpretation. *Scalia* v. *United States*, 62 F. (2d) 220 (C. C. A. 1); *Rosenwinkel* v. *Hall*, 61 F. (2d) 724, 726 (C. C. A. 7); *Reeves* v. *United States*, 35 F. (2d) 323, 325 (C. C. A. 8); *Nix* v. *James*, 7 F. (2d) 590 (C. C. A. 9).

The petitioners further contend that the restitution ordered to be paid in this case did not constitute a loss "caused by the offense for which conviction was had", and hence was not a proper condition under the Probation Act. As the court below held (R. 120), however, a sufficient basis for the order is found in count XI of the information. That count charged generally a failure to keep records of wages paid and hours worked. While a failure to keep records, standing alone, would not cause loss to the employees, "such an offense," the court below stated, "would cause a loss to any employee whose wages were computed and paid incorrectly and in an amount less than was actually due as a result of the * * * failure to keep such records". (R. 120.) The ad-

mission by the petitioners Berger and Kaminsky of the total amount due tacitly conceded that all of their employees suffered loss by the failure to keep records. Hence, the loss of wages for which they were ordered to make reparation was caused by the offense "for which conviction was had."

The information, read as a whole, indicated a continuing unlawful course of conduct, of which count XI was but a part. It made clear that Berger and Kaminsky were guilty of continuing violations of the Fair Labor Standards Act with respect to all their covered and nonexempt employees. It would have been impracticable to set out a separate count for each underpayment to each employee for each workweek. There is no occasion to consider whether the court could have ordered Berger and Kaminsky to make restitution without their consent. Since they conceded the entire amount due, agreed to make the payments, and acquiesced in the method of allocation (R. 101, 120), all the requirements for a valid restitution order are supplied by the information or by the oral stipulation of the petitioners. Under those circumstances, the restitution order was without error.

3. The order requiring Cohn to sign the checks necessary for distribution of the fund held in the joint bank account was clearly a proper exercise of the district court's discretion in enforcing the probation decree. The order was not intended

to, and did not, create or continue any obligations or rights with respect to Berger and Kaminsky. It merely required Cohn who had "accepted the obligations of one designated to aid in carrying out the probation order" (R. 121), to perform the ministerial function the court had delegated to him. When the money was tendered into court and deposited in the bank, the district court, the probation officer, and the Wage and Hour Division took it for granted that the criminal and probation proceedings had come to an end. Accordingly, in the order from which this appeal was taken, the court did not mention Berger and Kaminsky. Nor are they in any way affected by it. They therefore have no standing to contest its validity. *Grant and Burlingame* v. *United States*, 227 U. S. 74; *In re Michigan-Ohio Bldg. Corp.*, 117 F. (2d) 191 (C. C. A. 7).

The problem before the district court was that of distributing the money according to the terms of the order directing the deposit. While the court did not undertake to prepare the schedules itself,[4] it retained jurisdiction to compel distribution according to its mandate. The juris-

[4] It was not necessary for it to do so, as the petitioners contend. This Court has indicated that "where accounts are complex and intricate, or the documents or other evidence voluminous, or where extensive computations are to be made, it is better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself." *Ex-parte Peterson*, 253 U. S. 300, 313.

diction of a court of record once acquired in a cause is not exhausted by rendition of judgment, but continues until the judgment is satisfied and includes the power to issue all proper process necessary to its enforcement. Judicial Code, sec. 262 (28 U. S. C. 377); *Riggs* v. *Johnson County*, 6 Wall. 166; *Phelps* v. *Mutual Reserve Fund Life Assn.*, 112 Fed. 453 (C. C. A. 6), affirmed 190 U. S. 147. Hence, when Cohn failed to perform the obligations which he had voluntarily assumed under the order directing the deposit and distribution, the district court could properly compel him to obey its order.

The court below correctly ruled, therefore, that "the order from which he [Cohn] appealed was in aid of the enforcement of the order of probation and was without error," and that he had no interest to protect "in respect to the content and conditions of the probation order" (R. 121). Nor does he have any interest in the allocation of the fund to be distributed. Those who paid the money have already consented to the terms of its distribution. Cohn's sole function, despite his claim of joint responsibility which was rejected by both courts below, was to sign the checks not as a privately interested party, but as an officer of the court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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